Petition

81-1679

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SEYMOUR JOSEPH CASSEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

DOES A FEDERAL DISTRICT COURT IMPERMISSIBLY RESTRICT THE SCOPE OF THE VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS IN A CRIMINAL PROSECUTION BY REFUSING TO ASK REQUESTED QUESTIONS ON TOPICS SUCH AS THE JURORS' RELATIONSHIP TO THE PROSECUTION, THE JURORS' RELATIONSHIP TO VICTIMS OF CRIME, AND THE JURORS' ABILITY TO FOLLOW THE LAW?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
RULES INVOLVED	4
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	6
REASONS FOR GRANTING THE WRIT	13
THE CASE AT BENCH IS IN DIRECT CONFLICT WITH PREVIOUS DECISIONS OF OTHER CIRCUITS AND CONTRAVENES THE CLEAR IMPORT OF RULE 24 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.	13
CONCLUSION	29
APPENDIX	A-1
OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT; ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC.	

TABLE OF AUTHORITIES

Page

Cases

Ristiano v. Ross
424 U.S. 589 (1976) 14

United States v. Baldwin
607 F.2d 1295
(9th Cir. 1979) 21, 23, 26, 28

United States v. Blount
479 F.2d 650
(6th Cir. 1973) 17, 25

United States v. Dellinger
472 F.2d 340
(7th Cir. 1972) 15, 24, 26

United States v. Martin
507 F.2d 428
(7th Cir. 1974) 23, 26, 27

United States v. Robinson
475 F.2d 376
(D.C. Cir. 1976) 14, 15

United States v. Segal
534 F.2d 578
(3rd Cir. 1976) 14

United States v. Shavers
615 F.2d 266
(5th Cir. 1980) 19, 26

Page

Statutes

18 U.S.C. § 2(a) 5

21 U.S.C. § 841 5

21 U.S.C. § 843(b) and (c) 5

21 U.S.C. § 846 5

28 U.S.C. § 1254(1) 2

Rules

Federal Rules of Criminal Procedure, Rule 24 4, 13

Texts

Moore, Federal Practice [2nd Ed. 1981] Section 24.03 14

United States Constitution

Fifth Amendment 3

Sixth Amendment 3

No. _____

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SEYMOUR JOSEPH CASSEL,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Seymour Joseph Cassel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 14, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported, appears in the Appendix hereto, as does the Order of the Court denying the petition for rehearing en banc. No opinion was rendered by the United States District Court for the Northern District of Iowa.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 14, 1982. A timely petition for rehearing en banc was denied on February 12, 1982. This petition is filed within sixty days of that date. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by

law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

RULE INVOLVED

Rule 24 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

STATEMENT OF THE CASE

Defendant was charged by indictment in Count II with conspiracy to both (1) possess cocaine with intent to distribute the same and (2) distribute cocaine, all in violation of Title 21, United States Code, Sections 841 and 846 and Title 18, United States Code, Section 2(a). Count III alleged that the defendant used a public telephone communication facility in facilitating the possession of cocaine with intent to distribute the same, in violation of Title 21, United States Code, Section 843(b) and (c).

Defendant pled not guilty and proceeded to trial by jury, at the conclusion of which he was found guilty as charged. The District Court denied his motion for new trial and sentenced

defendant to concurrent probationary sentences of six months confinement to a treatment institution and cumulative fines in the amount of twenty-five thousand dollars. Defendant thereupon filed a timely notice of appeal, and the Court of Appeals subsequently affirmed the judgment of conviction. Defendant is presently at liberty upon bail pending appeal.

STATEMENT OF THE FACTS

At the commencement of the jury voir dire proceedings, the prosecution and the defense were furnished with the names, ages, addresses, and occupations of the prospective jurors. The Court then inquired if any members of the panel knew the respective counsel or the defendant (Tr. p. 12), heard or read or

talked about the case (Tr. p. 12), previously sat on any type of jury (Tr. p. 12), had been or were related to law enforcement officers and if so, whether that would prejudice them (Tr. pp. 12-14), would be prejudiced by the nature of the charges or against either of the parties (Tr. p. 14), believed that there was an inference or presumption of guilt against the defendant because he was indicted (Tr. p. 14), knew of any reason why they could not be fair and impartial jurors (Tr. p. 14), and would be satisfied to have a juror like them as a juror if they were the defendant or the prosecution (Tr. p. 15).

Defense counsel then stated to the Court that the Court had not asked defendant's written requested voir dire question numbers 1, 3, 4, 5, 8, 15, 16,

17, 18, 21, 23, 24, 25, 26, 27, 28, 29, 30, and 31 (Tr. p. 16). The Court then erroneously stated that it believed it had asked one of these questions, whether any of the panel had ever been a victim of a crime or a complaining witness in a criminal case (Tr. p. 16). The Court refused, however, to ask any of the requested questions and inquired whether there were any challenges for cause, to which counsel responded that there were "none other than the Court's failure to ask these questions." (Tr. p. 16.) Later, in exercising the peremptory challenges, defense counsel approached the bench and informed the Court that

> "it is the defendant's position that the jury has not been questioned sufficiently for the defendant to be able to intelligently exercise his pre-emptories (sic) which is just taking a shot

> and taking ten people off. I don't think there has been enough questions for an intelligent determination to be made by the defense on the pre-emptory (sic) challenges."
> (Tr. p. 17.)

The Court declined to ask any further questions, and the jury was then selected (Tr. p. 17).

The questions which the Court refused to ask include the following:

> "1. Are any of you friendly, associated, or related to any one in the prosecutor's office, the police department, or any law enforcement agency? 1/

> "3. Have any of you ever been the victim of a crime, and if so, what was the crime?

1/ The question previously posed by the Court related to this subject asked if any panel member had been a law enforcement officer or was related to a law enforcement officer. The panel members were not asked if they were friendly, associated, or related to anyone in the prosecutor's office or friendly or associated with any one in law enforcement.

"4. Have any members of your family or close friends ever been the victim of a crime, and if so, what was the crime?

"5. Have you or any members of your families ever been the complaining witnesses in a criminal case, and if so, with what crime was the defendant charged?

"15. Do you understand that all the elements of the crime charged must be proved beyond a reasonable doubt, and that if one element is not proven beyond a reasonable doubt, would you then vote not guilty?

"16. If the prosecution fails to prove the guilt of the accused with that degree of moral certainty that amounts to proof beyond a reasonable doubt, would you then vote not guilty?

"17. You understand, do you not, that the burden of proving the defendant guilty beyond a reasonable doubt rests with the prosecution, and that the accused need not introduce any evidence whatsoever?

"18. Knowing that, would you require the accused at any time to satisfy you as to his innocence?

"21. Do you realize that the Court will instruct you as to the law, but that you are the sole and exclusive judge(s) of the facts?

"23. Would you give the accused the benefit of your individual judgment in arriving at a verdict in this case?

"24. Now, if you come to the conclusion that the prosecution had not proven the guilt of the accused beyond a reasonable doubt, and you found that a majority of the jurors believed the defendant was guilty, would you change your verdict only because you were in the minority?

"25. You understand of course, that an impartial trial by an unbiased jury is a constitutional guarantee no matter what the charges are against the defendant?

"26. Do you realize that you are bound to reach a verdict solely on the evidence introduced during the trial?

"27. If from your experience you believe, or have the feeling that certain facts exist, but these facts have not been proven by satisfactory evidence, would you discard your beliefs or feeling and decide this case only

on the evidence or lack of evidence?

"28. Do you understand that the comments of the United States attorney and defense counsel are not evidence in this case?

"29. It is anticipated that Federal law enforcement officers and State law enforcement officials will be called as witnesses for the Government in this case. Do you understand that you are to judge the testimony of these people the same as that of any other witness and are not to attach any special significance to their testimony just because they are Government officials?

"30. Do you understand that you must accept the law in this case as presented to you by the Judge?

"31. Do each of you promise not to form an opinion as to the guilt or innocence of the defendant in this case until all of the evidence, both the Government's and the defendant's, has been presented to you and this Court has instructed you regarding the applicable law?"

REASONS FOR GRANTING THE WRIT

THE CASE AT BENCH IS IN DIRECT CONFLICT WITH PREVIOUS DECISIONS OF OTHER CIRCUITS AND CONTRAVENES THE CLEAR IMPORT OF RULE 24 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 24 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

The examination of the veniremen

"gives the parties an opportunity (1) to determine whether statutory qualifications are met; (2)

> to determine the existence of actual bias or prejudice as a basis for excusing jurors for cause; and (3) to exercise peremptory challenges against those jurors thought to be hostile or unsympathetic."
> (Moore's Federal Practice [2nd Ed. 1981] Section 24.03, pp. 31-32.)

In furtherance of this purpose, the cases are uniform in holding that

> "the parties have the right to some surface information about prospective jurors which might furnish the basis for an intelligent exercise of peremptory challenges or motions to strike for cause based on a lack of impartiality."
> (Moore's Federal Practice [2nd Ed. 1981] Section 24.03, p. 33, citing **Ristaino v. Ross** (1976) 424 U.S. 589 and **United States v. Segal** (3rd. Cir. 1976) 534 F.2d 578).

In this manner "voir dire procedures must provide a full and final opportunity to expose bias or prejudice on the part of the veniremen." (**United States**

v. Robinson (D.C. Cir. 1976) 475 F.2d 376, 380-381.)

The leading federal decision in the area of refusal to ask requested voir dire questions is **United States v. Dellinger** (1972) 472 F.2d 340, where the Court specifically stated at page 370, that the defense request

> "raised a judicial duty 'to do what was reasonably practicable to enable the accused to have the benefit of the right of peremptory challenge or to prevent unfairness.'"

As explained by the Court at pages 367-368:

> "The focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present."
>
> * * *
>
> "The government's position [that the court is obligated only to inquire as to disqualification

> for cause] must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. That it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias or cause."
>
> * * *
>
> "If this right [to exercise a peremptory challenge] is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges."

With these standards in mind, it is clear that the refusal of the District Court to make inquiry of the jury panel concerning the subject matter of the written questions of defense counsel constituted reversible error. As we set

forth below, those questions directly probed for the existence of cause for excusing members of the panel and would have established a basis for a proper exercise of peremptory challenges.

In **United States v. Blount** (6th Cir. 1973) 479 F.2d 650, the Court ruled that it was reversible error for the District Court to refuse defendant's request to inquire if the veniremen

> "could accept the proposition of law that a defendant is presumed to be innocent, has no burden to establish his innocence, and is clothed throughout the trial with this presumption."

The rationale of the Court, at pages 651-652, was as follows:

> "The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. Wright, 2 Federal Practice and Procedure § 382 (1969). It follows, then, that a requested

question should be asked if an anticipated response would afford the basis for a challenge for cause. See e.g., **United States v. Carter**, 440 F.2d 1132 (6th Cir. 1971); **Brown v. United States**, 119 U.S.App.D.C. 203, 338 F.2d 543 (D.C. Cir. 1964); **United States v. Napoleone**, 349 F.2d 350 (3d Cir. 1965). Certainly, a challenge for cause would be sustained if a juror expressed his incapacity to accept the proposition that a defendant is presumed to be innocent despite the fact that he has been accused in an indictment or information. It is equally likely that careful counsel would exercise a peremptory challenge if a juror replied that he could accept this proposition of law on an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire. Accordingly, the failure of the trial judge to ask the question upon request was erroneous and since the failure may have resulted in the denial of an impartial jury, the error cannot be dismissed as harmless. See **Brown v. United States, supra** (Burger, J.). It matters not that the putting of the question might also, as appellee contends, have constituted anticipatory argument to precondition the jury. This is

an unavoidable consequence of the voir dire jury examination."

In **United States v. Shavers** (5th Cir. 1980) 615 F.2d 766, the District Court refused to inquire (1) whether any members of the panel had been the victim of a crime and if so, what was the nature of the crime and was a weapon used, and (2) whether any members of the panel, their relatives or close friends had been victimized by similar injuries. In ruling that this refusal constituted an abuse of discretion, the Court of Appeal explained, at page 268 that:

> "[**United States v.**] **Delval** [(5th Cir. 1979) 600 F.2d 1980] established that the standard for evaluating the district court's exercise of its discretion is whether the means employed to test impartiality have created a reasonable assurance that prejudice would be discovered if present: '[T]he central inquiry is whether the district judge's "overall examination, coupled

with his charge to the jury, affords a party the protection sought" . . .' 600 F.2d at 1102-03 (citations omitted).

"Here, appellant's submitted but unasked questions numbered 1 and 16 were for the purpose of inquiring into experiences which could cause a prospective juror to be prejudiced against appellant. **United States v. Poole**, 450 F.2d 1082 (3rd Cir. 1971). Certainly, a juror who has been the victim of a crime involving a knife or gun or who has suffered lacerations in an altercation might well be prejudiced against one charged with assault with a deadly weapon.

"The trial judge refused to ask appellant's questions because he felt that they were 'basically covered with the questions that were asked by the Court or were not really material so far as obtaining a fair and impartial juror.'

"We disagree. The district court's questions were too broad. Inquiring generally about one's impartiality or participation in a criminal case as a witness or defendant fails to reach the important concerns highlighted in appellant's proposed questions and might not reveal latent prejudice. The

> court's questions did not afford Shavers the protection he sought and to which he was entitled under **Delval.** Appellant's proposed questions were 'reasonably necessary to enable the accused to exercise his peremptory challenges' and 'pertinent to the inquiry.' **Cook v. United States,** 379 F.2d 966, 971-72 (5th Cir. 1969). Therefore, we find abuse of discretion on the part of the trial judge in refusing to ask questions 1 and 16."

In **United States v. Baldwin** (9th Cir. 1979) 607 F.2d 1295, the conviction was reversed where the District Court refused to ask

> "1) Whether any of the prospective jurors would give greater or lesser weight to the testimony of a law enforcement officer, by the mere reason of his/her position; 2) Whether any of the prospective jurors were acquainted with any of the prospective witnesses in the case."

The explanation of the Court, at page 1297, was as follows:

> "It is not an abuse of discretion for the trial judge to

insist upon conducting a voir dire examination, but if he does so, he must exercise a sound judicial discretion in the acceptance or rejection of supplemental questions proposed by counsel. Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality. Cf. **United States v. Giese**, 597 F.2d 1170, 1181 (9th Cir. 1979), and cases cited therein. By 'sound judicial discretion,' we mean that the trial judge should keep uppermost in his mind the fact that the parties have the right to some surface information about prospective jurors which might furnish the basis for an informed exercise of peremptory challenges or motions to strike for cause based upon a lack of impartiality. Cf. **United States v. Segal**, 534 F.2d 578, 581 (3rd Cir. 1976), and cases cited therein; **United States v. Jackson**, 542 F.2d 403, 413 (7th Cir. 1976), and cases cited therein."

* * *

"The lower court twice erred in refusing to ask both questions. As to the question concerning the venirepersons' attitudes toward government agents acting in their official capacity, the District of Columbia

Court of Appeals stated in **Brown v. United States**, 119 U.S.App. D.C. 203, 338 F.2d 543 (D.C. Cir. 1964) that:

* * *

"'[W]hen important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be . . . inclined to credit their testimony, a query as to whether a juror would have such an inclination . . . should be given if requested.' 119 U.S.App.D.C. at 205, 338 F.2d at 545; and see **Sellers v. United States**, 106 U.S.App.D.C. 209, 271 F.2d 475 (D.C. Cir. 1959)."

To the same effect is **United States v. Martin** (7th Cir. 1974) 507 F.2d 428, quoted with approval in **Baldwin. Martin** reversed the judgment of conviction where the District Court refused to ask whether the veniremen had friends or relatives employed by the Government; was a member of a law enforcement organization or related to such a

member; and felt that a government agent's testimony was entitled to more weight than the testimony of a witness who was not a government agent. The Court felt that this last question was particularly important and concluded, at pages 432-433, with respect to whether the Court's instructions on these matters caused any errors:

> "Mere admonitions, however, are not enough. The sole purpose of voir dire is not to tell potential jurors that they are to be fair and then ask them if they think they can be impartial. The defendant's proposed questions were meant to elicit specific attitudes and prejudices. We cannot assume that a juror would state that he could not be impartial merely because he had a close relationship with the government or a high regard for the credibility of government agents. Such questions should have been asked directly."

Similarly, the Court in **United States v. Dellinger** (1972) 472 F.2d 340, in

reversing the judgment of conviction for improperly restricting the entire scope of voir dire, specifically criticized the District Court's failure to ask each potential juror whether they had "any close relatives or friends who are employed by any law enforcement agency or other agency of the local, state, or federal government."

With these cases in mind, it is clear that the overly restrictive voir dire examination in the case at bench constituted reversible error. Here, as in **Blount**, which is directly on all fours with the case at bench, the District Court's refusal to ask Cassel's proposed questions 15, 16, 17, and 18, resulted in a prejudicially erroneous failure to make inquiry concerning the presumption of innocence and burden of proof.

Similarly, here as in **Shavers**, which is also directly on point, the District Court's refusal to ask Cassel's proposed questions 3, 4, and 5 prejudicially erroneously precluded necessary inquiry concerning whether jurors or those near and dear to them had been victim of drug offenses and bore any resulting bias or animosity. Likewise, here as in **Baldwin**, **Martin**, and **Dellinger**, which are also identical to the case at bench, the District Court's failure to fully inquire as to question numbers 1 and 29 constituted prejudicial error, as defendant was specifically entitled to ascertain the relationship of the jurors to law enforcement and to determine whether jurors would give more credence to testimony of law enforcement officers. Finally, it should be noted

that the District Court's failure to make the inquiry requested by defendant's questions 21, 23, 24, 25, 26, 27, 28, 30, and 31 constituted reversible error under the established standards of voir dire examination as summarized earlier herein.

Nor is it any answer to argue that the Court properly instructed on these areas. Again, as stated in **Martin**, at pages 432-433:

> "Mere admonitions, however, are not enough. The sole purpose of voir dire is not to tell potential jurors that they are to be fair and then ask them if they think they can be impartial. The defendant's proposed questions were meant to elicit specific attitudes and prejudices. We cannot assume that a juror would state that he could not be impartial merely because he had a close relationship with the government or a high regard for the crediibility of government agents. Such questions should have been asked directly."

The appropriate conclusion, rather, was stated by the Court in **Baldwin**, at pages 1298-1299 as follows:

> "[W]here, as in the case at bar, the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error. The reason for this is that, as a result of such error, the number of meaningful peremptory challenges or challenges for cause available to a defendant necessarily is reduced, and the inhibition of the right to challenge for cause or peremptorily is in that instance deemed to be prejudicial. **United States v. Allsup**, 566 F.2d 68, 71 (9th Cir. 1977), and cases cited therein; and see **United States v. Dellinger**, 472 F.2d 340, 366-377 (7th Cir.), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1972); **United States v. Rucker**, 557 F.2d 1046, 1047-1049 (4th Cir. 1977)."

This Court should hold that the District Court erroneously restricted

the proper course of requested voir dire.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner

Appendix

UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

No. 81-1651

United States of America,

Appellee,

v.

Seymour Joseph Cassel,

Appellant.

Appeal from the
United States District Court
for the Northern District of Iowa

Submitted: December 17, 1981
Filed: January 14, 1982

Before HEANEY, BRIGHT and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

Seymour Cassel appeals from his convictions for conspiracy to possess cocaine with intent to distribute and to distribute cocaine in violation of 21

U.S.C. §§ 841, 846 and 18 U.S.C. § 2a, and for using a telephone to facilitate the possession of cocaine with intent to distribute in violation of 21 U.S.C. § 843. We affirm.

Cassel was fined $15,000 and sentenced to five-years imprisonment, to be suspended on the condition that he be confined to a treatment center for six months and thereafter be placed on probation for four years on the conspiracy count, and was fined $10,000 and sentenced to a six-month term in a treatment center to be followed by four years of probation on the telephone count. The sentences are to run consecutively. Cassel appeals, contending that the district court committed reversible error (1) by failing to give the defendant's requested jury instructions, and

(2) by refusing to include certain questions requested by the defendant in the court's voir dire of prospective jurors.

As to Cassel's first contention, we have carefully reviewed the record and briefs, and find that the district court's refusal to give the requested instructions did not constitute reversible error.

Cassel's second contention presents more troublesome questions which require greater discussion. The district court conducted the jury voir dire. The defendant proposed a number of questions for prospective jurors which the trial judge refused to ask. The questions can be placed in three general categories:

(1) whether the venirepersons had some relationship with anyone in a law enforcement agency; [1]

(2) whether they, or any of their friends or family, had been a victim of a crime; [2] and

(3) whether they understood or were willing to accept the trial court's instructions regarding burden of proof

---

[1] "Are any of you friendly, associated, or related to any one in the prosecutor's office, the police department, or any law enforcement agency?"

[2] [1] Have any of you ever been the victim of a crime, and if so, what was the crime?

[2] Have any members of your family or close friends ever been the victim of a crime, and if so, what was the crime?

[3] Have you or any members of your families ever been the complaining witnesses in a criminal case, and if so, with what crime was the defendant charged?

and a variety of other proposition of law. 3/

3/ For example, the defendant requested that the trial court ask the following questions:

[1] Do you understand that all the elements of the crime charged must be proved beyond a reasonable doubt, and that if one element is not proven beyond a reasonable doubt, would you then vote not guilty?

* * *

[2] You understand, do you not, that the burden of proving the defendant guilty beyond a reasonable doubt rests with the prosecution, and that the accused need not introduce any evidence whatsoever?

* * *

[3] You understand of course, that an impartial trial by an unbiased jury is a constitutional guarantee no matter what the charges are against the defendant?

[4] Do you realize that you are bound to reach a verdict solely on the evidence introduced during the trial?

* * *

(continued)

The record is silent as to why the district court refused to ask the precise question in category (1). The district court indicated that it refused to ask the questions in category (2) because it had already covered the inquiry in substance in another form. Finally, the district court declined to ask the questions in category (3) on the ground that they would be covered in the jury instructions.

3/ (continued)

[5] Do you understand that the comments of the United States attorney and defense counsel are not evidence in this case?

* * *

[6] Do you understand that you must accept the law in this case as presented to you by the Judge?

In total, the defendant requested that the trial court ask fifteen such questions regarding legal propositions.

After reviewing the record, we are left with the view that the district court's failure to ask the proposed questions was unjustified. While a busy trial judge can always consider the factor of time in determining how to conduct voir dire; here, the defendant's proposed questions could have been asked in a reasonably short period. Moreover, the questions might have aided Cassel in exercising his peremptory and for cause challenges.

The question remains, however, as to whether the district court's voir dire was so inadequate as to deny the defendant a fair trial. "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." **Rosales-Lopez v. United**

States, 68 L.Ed. 22, 28 (1981). Without an adequate voir dire, the trial judge cannot fulfill his duty to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence. Id. Moreover, a careful voir dire is necessary to solicit sufficient information to permit a defendant to intelligently exercise his peremptory challenges, as well as his challenges for cause. Id.; **United States v. Barnes**, 604 F.2d 121, 142 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

Notwithstanding the importance of voir dire, federal judges are accorded substantial discretion in determining how best to conduct voir dire. **Rosales-Lopez v. United States**, supra, 68 L.Ed. at 28-29; **United States v. Bowman**, 602

F.2d 160, 165 (8th Cir. 1979). This discretion, however, is not unlimited. It must be exercised consistent with "the essential demands of fairness." E.g., **Aldridge v. United States**, 283 U.S. 308, 310 (1931); **United States v. Delval**, 600 F.2d 1098, 1102 (5th Cir. 1979).

The district court has a duty to ensure that the defendant receives a fair trial. **United States v. Poludniak**, 657 F.2d 948, 957 (8th Cir. 1981). To comply with this duty, the district court's voir dire must "have created 'a reasonable assurance that prejudice could be discovered if present.'" **United States v. Delval, supra**, 600 F.2d at 1102-1103. In other words, "the central inquiry is whether the district judge's 'overall examination, coupled

with his charge to the jury, affords a party the protection sought.'" Id.

We recognize that there is no set formula for determining when a district court's voir dire is constitutionally deficient. But several factors present here convince us that the district court's voir dire was not so inadequate as to violate the Constitution. First, the district court asked a question with respect to law enforcement officers that was similar to defendant's proposed question in category (1). The court inquired: "Have you or any members of your immediate families ever served as law enforcement officers? This would mean members of police force, sheriff's department, deputies, any type of law enforcement. FBI, whatever it might be." Second, after the defense counsel

objected to the court's failure to ask the proposed questions in category (2), the court stated: "Have any of you ever been a victim of a crime? Have any of you, or members of your immediate family, ever been a complaining witness in a criminal case?" While it is not entirely clear that this statement was addressed to the jury as a question, it was made in the presence of the jury and the jury had some opportunity to respond. Third, Cassel has not demonstrated that his proposed questions related to specific issues or circumstances in this case. Compare **United States v. Dellinger**, 472 F.2d 340, 367-370 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (In "Chicago 7" trial, the district court erred by not asking questions that would have elicited a

prospective juror's attitude toward public protest against the Vietnam War, long hair, lifestyles different than their own, policemen and so forth.). Fourth, the defendant does not point to any specific prejudice that the proposed questions might have uncovered. [4/] See **United States v. Delval, supra,** 600 F.2d at 1103 (No reversible error in district court's voir dire.). Finally, the district court's jury instructions covered at least the substance of defendant's proposed questions in category (3). See **Jacobs v. Redman,** 616 F.2d 1251, 1255-

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[4/] While the existence or nonexistence of actual juror bias is relevant to the question of whether the court's voir dire prejudiced the defendant, a defendant need not necessarily show that members of the jury were in fact prejudiced to establish a constitutional violation. **United States v. Dellinger,** 474 F.2d 340, 367 (7th Cir. 1972).

1256 (3d Cir.), cert. denied, 446 U.S. 944 (1980) (No reversible error in district court's voir dire.).

The judgment of the district court is, therefore, affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 81-1651
September Term, 1981

United States of America,

Appellee,

vs.

Seymour Joseph Cassell,

Appellant.

Appeal from the
United States District Court for
the Northern District of Iowa.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 12, 1982

Opposition

Office - Supreme Court, U.S.
FILED
MAY 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1679

In the Supreme Court of the United States

OCTOBER TERM, 1981

SEYMOUR JOSEPH CASSEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court's failure to ask 19 of the 31 questions petitioner suggested for the *voir dire* examination of prospective jurors constituted an abuse of discretion.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brown v. *United States*, 338 F.2d 543	7
Ham v. *South Carolina*, 409 U.S. 524	5
Morford v. *United States*, 339 U.S. 258	7
Ristaino v. *Ross*, 424 U.S. 589	4, 5, 7
Rosales-Lopez v. *United States*, 451 U.S. 182	4, 7, 9, 10
Sellers v. *United States*, 271 F.2d 475	7
United States v. *Baldwin*, 607 F.2d 1295	7
United States v. *Blount*, 479 F.2d 650	9
United States v. *Corey*, 625 F.2d 704, cert. denied, 450 U.S. 925	8
United States v. *Dellinger*, 472 F.2d 340, cert. denied, 410 U.S. 970	7, 8
United States v. *Martin*, 507 F.2d 428	7
United States v. *Price*, 577 F.2d 1356	8
United States v. *Shavers*, 615 F.2d 266	8
United States v. *Wooten*, 518 F.2d 943, cert. denied, 423 U.S. 895	9

Statutes and rule:

21 U.S.C. 841	2
21 U.S.C. 843	2
21 U.S.C. 846	2
Fed. R. Crim. P. 24	4, 9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-13) is reported at 668 F.2d 969.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1982 (Pet. App. A-13). A petition for rehearing was denied on February 12, 1982 (Pet. App. A-14). The petition for a writ of certiorari was filed on March 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 841 and 846 (Count II) and of using a telephone to facilitate the possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 843 (Count III). Petitioner was sentenced to five years' imprisonment on Count II, but the sentence was suspended on condition that he be confined at an appropriate treatment center for six months and then placed on probation for four years. Petitioner also was sentenced to six months' confinement in a treatment center and four years' probation on Count III, that sentence to run concurrently with the sentence on Count II.[1] Petitioner was fined a total of $25,000. The court of appeals affirmed (Pet. App. A-1 to A-13).

The evidence at trial showed that between May and October 1980, petitioner supplied cocaine to Charles McDowell and to Mark Dunkelberger for resale and distribution in Waterloo, Iowa (Tr. 30-70). Petitioner did not testify, but he presented evidence challenging the sufficiency of the tests used to establish that the substance involved was cocaine.[2]

2. The trial court conducted the *voir dire* examination of the jury venire. The judge first described the case to the panel of potential jurors, advising

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[1] The statement in the opinion of the court of appeals (Pet. App. A-2) that the sentences were consecutive is erroneous.

[2] Petitioner also challenged the Drug Enforcement Administration's handling of the case as inconsistent with the DEA manual (Tr. 400-415).

them that an indictment is only a charge and affords no basis for any inference of guilt. The court noted that a defendant in a criminal case is presumed innocent and the government must prove guilt beyond a reasonable doubt (Tr. 11). The trial judge inquired as to the jurors' relationships with the attorneys, the parties, and law enforcement officials (Tr. 12). When three veniremen indicated that they were either employed as law enforcement officials or had relatives who were employed as law enforcement officials, the court made further inquiry to determine if the veniremen could nonetheless render an impartial verdict (Tr. 13-14). The court also inquired whether the nature of the charges would affect the jurors, recalling that the case involved cocaine, and asked if "[a]ny of you, because of the nature of the charges involving drugs, would * * * have any prejudice for or against either the Government or the defendant?" The court asked whether any of the jurors inferred or presumed that the defendant was guilty because he had been indicted. Finally, the court asked generally whether each of the jurors would be satisfied to have a juror with his state of mind if he were the defendant or the United States Attorney (Tr. 14-15).

When the court asked whether there were any further questions, petitioner's counsel stated generally that 19 of his 31 requested questions had not been asked. The trial judge indicated his belief that he had asked the substance of Question 3. The court then said: "I believe the balance of those questions will be covered by the Court's instructions. They go to matters of law which the Court will instruct the jury on" (Tr. 16).

ARGUMENT

Petitioner contends (Pet. 13-29) that the *voir dire* examination of the prospective jurors was constitutionally inadequate and that it should have been supplemented by his 19 questions. This claim was correctly rejected by the court below.[a]

1. The trial court's discretion to determine how the *voir dire* examination of the jury venire is to be conducted, the form of the questions to be asked, and the scope of the inquiry is necessarily broad. See, *e.g.*, *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981); Fed. R. Crim. P. 24. *Voir dire* is important to the goal of assuring a criminal defendant's right to an impartial jury. *Rosales-Lopez* v. *United States*, *supra*, 451 U.S. at 188. Nonetheless, a defendant is constitutionally entitled to an impartial jury; he is not entitled to have potential jurors specifically questioned as to every matter that might be relevant to the exercise of peremptory challenges or even challenges for cause.

As the Court explained in *Ristaino* v. *Ross*, 424 U.S. 589, 594-595 (1976) (citations and footnote omitted):

> The Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that con-

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[a] We assume that petitioner's general objection to the court's failure to ask the requested 19 questions is sufficient to preserve his claim. We note, however, that petitioner simply complained that the court had not asked all the questions he had submitted (Tr. 16). He offered no explanation of why any of those questions were necessary in this case, other than the assertion that (Tr. 17) "the jury has not been questioned sufficiently for the defendant to be able to intelligently exercise his pre-emptories [sic] * * *." Compare *Rosales-Lopez* v. *United States*, 451 U.S. 182, 193 (1981).

> ceivably might prejudice veniremen against him. *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." Thus, the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant.

Thus, in *Ham* v. *South Carolina*, 409 U.S. 524 (1973), the Court held that a specific question concerning potential racial bias was constitutionally required because racial issues were "inextricably bound up with the conduct of the trial" (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 597) and because "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit * * * invidious[] discriminat[ion] on the basis of race" (*Ham* v. *South Carolina*, *supra*, 409 U.S. at 526-527). But, unable "to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices" (*id.* at 528), the Court rejected the claim that the defendant in *Ham* was constitutionally entitled to have prospective jurors specifically questioned as to possible prejudice against him because of his beard.

In this case the *voir dire* was more than sufficient to satisfy constitutional standards. Compare *Ristaino* v. *Ross*, *supra*, 424 U.S. at 592-593 & n.3. None of the 19 questions was constitutionally required. Moreover, the trial judge questioned the members of the panel as to their relationships with law enforcement personnel and whether they knew any of the members of the prosecutor's staff (Tr. 12; see also *id.* at 8-9; compare Pet. 9 (Question 1)). Petitioner's

first question, therefore, was substantially covered. As to whether any of the jurors, any member of their families, or any of their friends (Pet. 9-10 (Questions 3 & 4)) had been the victim of a crime, it should be noted that the only victims of the crimes with which petitioner was charged were his customers. Moreover, the court specifically inquired whether the nature of the charges would prevent any of the jurors from being impartial (Tr. 14), a question more likely to uncover the kind of bias petitioner's Questions 3 and 4 seem to have been intended to uncover. More generally, the court asked whether any of the jurors was aware of any matter that had not been touched on that might affect his qualifications to serve fairly and impartially (Tr. 14-15) and whether each of them would be content to have the case (Tr. 15) "tried by a jury of persons in the same frame of mind as you find yourself in today."

Petitioner's questions concerning the prosecution's burden of proof, the presumption of innocence, the juror's individual obligation to decide the case fairly and impartially, only on the evidence presented, and in accordance with the judge's instructions on the law, and the jury's power to determine the facts and witness credibility (Pet. 10-12 (Questions 15-18, 21, 23-30)) were all covered in the judge's instructions to the jury (see Tr. 504-518).[4] There is no reason to believe that any of the jurors disregarded the judge's instructions.[5]

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[4] The court's witness credibility instruction (Tr. 516) did not specifically refer to law enforcement officials. Petitioner's Question 31 was, of course, inappropriate as an instruction since the evidence was then complete.

[5] In addition, during the *voir dire* examination the trial judge explained that the indictment provided no basis for

2. Depending on the surrounding circumstances, including the facts of the case and the questions asked during *voir dire*, failure to ask particular questions may constitute nonconstitutional error requiring reversal. See, *e.g.*, *Rosales-Lopez* v. *United States*, *supra*, 451 U.S. at 192; *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9; *Morford* v. *United States*, 339 U.S. 258 (1950). Thus, after taking into account "such factors as the importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venireperson's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony of the government agent is corroborated by non-agent witnesses," *United States* v. *Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979), the Ninth Circuit has held that refusal to inquire whether veniremen would be inclined to credit the testimony of a government agent simply because he was a government agent constituted reversible error. See *Brown* v. *United States*, 338 F.2d 543, 544-545 (D.C. Cir. 1964); *Sellers* v. *United States*, 271 F.2d 475 (D.C. Cir. 1959). *United States* v. *Martin*, 507 F.2d 428, 432-433 (7th Cir. 1974), and *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), are similar.[6] In none of those

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inferring guilt, that a criminal defendant is presumed innocent, and that the government has the burden of proving guilt beyond a reasonable doubt (Tr. 11).

[6] In *Martin* the court concluded that "particular aspects of the * * * trial" indicated that the jurors' attitude toward the government and government employees should have been

cases, however, did the court of appeals purport to adopt a per se rule requiring specific inquiry in all cases concerning the ability of potential jurors to objectively evaluate the credibility of government employees. See, *e.g.*, *United States* v. *Corey*, 625 F.2d 704 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981). In this case the critical witnesses against petitioner were not government employees, but his co-conspirators (see Tr. 30-70, 320-349).

In *United States* v. *Shavers*, 615 F.2d 266 (5th Cir. 1980), the court held that a defendant charged with assault with a deadly weapon (*i.e.*, a knife) was entitled to have the jurors asked whether any of them had ever been the victim of a crime or whether any of them, their relatives, or close friends had suffered serious lacerations. The need for such questions is considerably less substantial in cases involving the sale of narcotics. Nothing in *Shavers* suggests that failure to ask such questions would constitute reversible error in a drug case, particularly where (as in this case) the court had spe-

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explored on *voir dire*. 507 F.2d at 432. Since three of the four government witnesses were government employees, the court found that a question concerning the jurors' perception of the credibility of government employees was "particularly important." *Ibid.*

Dellinger involved the trials of a number of celebrated "activists" (including Abbie Hoffman, Jerry Rubin, and Tom Hayden) for their parts in the violent confrontation between Chicago police and anti-war protestors during the 1968 Democratic convention. The court held that "some minimal inquiry" concerning the juror's feelings about the Vietnam war protests and "the so-called youth culture—hippies, yippies and freaks," and the jurors' relationships with law enforcement officers "was essential to a fair trial of this extraordinary case, at least when defendants have requested such inquiry." 472 F.2d at 369.

cifically inquired as to prejudice because of the nature of the offense.

3. In *United States* v. *Blount*, 479 F.2d 650 (6th Cir. 1973), the court held that the district court's failure to inquire during *voir dire* whether prospective jurors "could accept the proposition of law that a defendant is presumed to be innocent, has no burden to establish his innocence, and is clothed throughout the trial with this presumption" (479 F.2d at 651) constituted reversible error. The court reasoned (*ibid.*; citations omitted):

> The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel. It follows, then, that a requested question should be asked if an anticipated response would afford the basis for a challenge for cause. * * * Accordingly, the failure of the trial judge to ask the question upon request was erroneous and since the failure may have resulted in the denial of an impartial jury, the error cannot be dismissed as harmless.

With all respect, we submit that the court's reasoning in *Blount* is untenable. See, *e.g.*, *United States* v. *Price*, 577 F.2d 1356, 1366 (9th Cir. 1978); *United States* v. *Wooten*, 518 F.2d 943 (3d Cir.), cert. denied, 423 U.S. 895 (1975). Contrary to Fed. R. Crim. P. 24, which leaves the conduct of the *voir dire* to the discretion of the trial court, *Blount* would require the district court to ask every question that could be framed so that possible answers would furnish a basis for a challenge for cause. Moreover, the broad implications of *Blount* were laid to rest by this Court's subsequent decision in *Rosales-*

Lopez. Although a prospective juror who admitted racial bias would be subject to challenge for cause, in *Rosales-Lopez* this Court held that failure to ask a specific question concerning potential racial bias is reversible error only if the circumstances of the case indicate "that there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury" (451 U.S. at 191). Under some circumstances petitioner's Questions 15-18, 21, 23-30 might be appropriate for *voir dire*. But when, as in this case, the trial judge properly instructs the petit jury on the law, his failure to have made preliminary inquiry concerning the same matters during his *voir dire* examination of the venire can constitute reversible error only in the rarest of circumstances. No such circumstances were suggested in the district court; none are suggested here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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